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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL)
ADVOCATES,)
)
Plaintiff,)
)
v.)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, et al.,)
)
Defendants,)
)
THE STATE OF OREGON,)
)

Civil No. 05-1876-HA

MEMORANDUM IN SUPPORT OF
STIPULATED MOTION FOR
ENTRY OF REVISED CASE
MANAGEMENT ORDER

Mem. in Support of Stipulated Motion
for Entry of Revised Case Mgt. Order

Intervenor-Defendant, and)
)
NORTHWEST PULP AND PAPER)
ASSOCIATION,)
)
Intervenor-Defendant.)
_____)

INTRODUCTION

Plaintiff, Federal Defendants and Intervenor (collectively, “Parties”) are respectfully moving this Court to modify the briefing schedule set forth in the Court’s Order of November 3, 2010 (“Remand Order”). Doc. No. 248. In the Remand Order, the Court denied the Federal Defendants’ Motion for Voluntary Remand Without Vacatur (“Remand Motion”) (Doc. No. 224), and also ordered, inter alia, that: “federal defendants’ responsive briefing to plaintiff’s Motions for Partial Summary Judgment” are due no later than December 3, 2010; and Plaintiff’s replies are due no later than December 17, 2010. Id. The Parties request that the Court modify the briefing schedule in order to address two issues that the Parties and the Court had addressed in prior scheduling orders but that were not included in the Remand Order: (1) the filing of, and briefing in support of, cross-motions for summary judgment by the Federal Defendants and Intervenor; and (2) the additional time required to address the substantive issues raised in this case. See, e.g., Doc. No. 203 (Stipulated Case Management Order).

BACKGROUND

The Parties have negotiated several merits briefing schedules in the case that the Court has entered as orders. Doc. Nos. 33, 43, 64, 84, 203. From the outset, the Parties agreed that Plaintiff would move for summary judgment, and that Federal Defendants and Intervenor would file cross-motions for summary judgment. Accordingly, the Parties’ stipulations and the Court’s

orders included briefs from the Federal Defendants and Intervenor both in opposition to Plaintiff's summary judgment motions and in support of the cross-motions. See Doc. Nos. 33, 43, 64, 84, 203.

In addition, due to the complexity of the issues presented by this case, the briefing schedules called for a relatively substantial amount of time for the Parties to submit their briefs in support of their summary judgment motions and in opposition to the motions they were opposing. For example, the Stipulated Case Management Order entered by the Court on December 30, 2009 set forth the following merits briefing schedule:

April 16, 2010:	Deadline for Plaintiff to file dispositive motions
July 30, 2010:	Deadline for Federal Defendants to file oppositions and cross-dispositive motions
August 27, 2010:	Deadline for Intervenor-Defendants to file oppositions and cross-dispositive motions
October 15, 2010:	Deadline for Plaintiff to file oppositions to cross-dispositive motions and replies on dispositive motions
December 17, 2010:	Deadline for Federal Defendants to file replies on cross-dispositive motions
January 14, 2011:	Deadline for Intervenor-Defendants to file replies on cross-dispositive motions.

Doc. No. 203.^{1/}

After a short, agreed upon extension, Plaintiff filed its motions for summary judgment and supporting papers on April 21, 2010. Doc. Nos. 206-215. Shortly thereafter, Plaintiff and Federal Defendants began discussing the potential settlement of the ESA claims and potential remand of the Services' Biological Opinions and Incidental Take Statements. See Doc. No. 221. After those discussions did not produce an agreement, the Court stayed "briefing on the Parties' cross-motions for summary judgment," issued a briefing schedule for the briefing of the Remand Motion, and also ordered the Parties to confer and file a motion setting forth a proposed new case management plan within ten days after issuance of the Court's order on the Remand Motion. Doc. No. 223.

Pursuant to the Court's Order, briefing on the Motion for Remand commenced on July 26, 2010 and initially concluded on August 23, 2010. See Doc. Nos. 224-232. On August 31, 2010, the Court issued an Order requiring the Parties to file a joint status report no later than September 15, 2010 regarding a potential, conditional remand. Doc. No. 233. After the Parties sought and received two extensions of time to continue their discussions, see Doc. Nos. 236, 239, the Parties submitted a Status Report on October 8, 2010. Doc. No. 240. Pursuant to the Court's subsequent Order, Doc. No. 241, the Parties then submitted supplemental briefs on

^{1/} The Parties also had reached agreement on, and the Court had ordered on the Parties' stipulation, the structure and page limits for the summary judgment briefing. For their opening briefs, Plaintiff and Federal Defendants were limited to one brief of no more than 50 pages addressing Clean Water Act ("CWA") issues and one brief of no more than 40 pages addressing Endangered Species Act ("ESA") issues. (Doc. 203.) Intervenor's opening briefs were limited to 30 pages each. Id. For their second set of briefs, Plaintiffs and Federal Defendants were limited to one brief of no more than 45 pages addressing CWA issues and one brief of no more than 30 pages addressing ESA issues. Id. Intervenor's second briefs were limited to 20 pages each. Id. The Parties do not seek any changes to those page limits.

October 19, 2010 regarding the Motion for Remand. Doc. Nos. 242-247. On November 3, 2010, the Court issued the Remand Order, which, inter alia: denied the Federal Defendants' Remand Motion; ordered that "federal defendants' responsive briefing to Plaintiff's Motions for Partial Summary Judgment" were due no later than December 3, 2010; and also ordered that Plaintiff's replies were due no later than December 17, 2010. Doc. No. 248.

ARGUMENT

On the day that the Court issued the Remand Order, the Parties began discussing potential modifications to the briefing schedule contained in that Order. The Parties' discussions yielded agreement among the Parties on the following briefing schedule:

- January 14: Deadline for Federal Defendants to file oppositions and cross-dispositive motions
- January 28: Deadline for Intervenor-Defendants to file oppositions and cross-dispositive motions
- February 25: Deadline for Plaintiff to file oppositions to cross-dispositive motions and replies on dispositive motions
- March 25: Deadline for Federal Defendants to file replies on cross-dispositive motions
- April 1: Deadline for Intervenor-Defendants to file replies on cross-dispositive motions.

This schedule preserves the basic format of the previous scheduling orders entered in the case because it calls for the filing of, and briefing in support of, cross-motions for summary judgment by the Federal Defendants and the Intervenors. Cf. Doc. Nos. 33, 43, 64, 84, 203. In addition, this schedule allows for additional brief preparation time beyond what was set forth in the Remand Order but significantly condenses the previously ordered briefing schedules. For example, from now, the Parties' agreed schedule would allow slightly more than half the time

that Federal Defendants initially were allotted after the filing of Plaintiff's summary judgment motions. In addition, the Federal Defendants' two-month briefing period would include both the Thanksgiving and Christmas holidays. Federal Defendants require the two month time period to respond to the detailed briefs filed by Plaintiff on its CWA and ESA claims, which comprise 50 and 35 pages, respectively.

The remainder of the Parties' agreed schedule is similarly condensed. Plaintiff's second round of briefs would be due six weeks after Federal Defendants filed their cross-motions for summary judgment, rather than the eleven weeks that Plaintiff was given in the December 30, 2009 Stipulated Case Management Order. Doc. No. 203. Federal Defendants' second round of briefs would be due four weeks after Plaintiff files its second round of briefs, as opposed to the nine weeks that Federal Defendants were allotted in that Case Management Order. Id. Intervenor's briefing times also would be cut down substantially. Their cross-motions and initial briefs would be due two week after Federal Defendants', as opposed to the four week timeframe set forth in the Case Management Order. Id. Intervenor's second round of briefs would be due one week after Federal Defendants', in contrast to the four weeks previously provided. Id.

Thus, while the Parties' agreed schedule allows more time for briefing than was set forth in the Remand Order, the Parties believe that the proposed briefing schedule is extremely aggressive. The Parties are mindful that the case has been on the Court's docket for some time and are anxious to bring the case to conclusion. In addition, merits briefing under the Parties' schedule would conclude in advance of the anticipated parenting leaves to be taken by Plaintiff's counsel beginning in April. On the other hand, the issues raised in the case are complex and require a significant amount of time (and pages) to address adequately.

The Parties also have addressed their respective positions regarding oral argument. Plaintiff has requested oral argument. Doc. Nos. 207, 212. The Federal Defendants and Intervenor take no position, and defer to the Court's wishes regarding whether oral argument would be beneficial.

Regarding the potential scheduling of oral argument, the Parties have agreed that, in the event the Court schedules argument, the argument should take place no sooner than May 2, 2011 to avoid falling too early within the anticipated parenting leave of Plaintiff's counsel who would be presenting argument.

CONCLUSION

For the foregoing reasons, the Parties jointly request that the Court enter the Revised Case Management Order that is being filed herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2010, I caused a true copy of the foregoing MEMORANDUM IN SUPPORT OF STIPULATED MOTION FOR ENTRY OF REVISED CASE MANAGEMENT ORDER to be served on each of the following counsel in the manner indicated below:

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